

STATE OF CALIFORNIA

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OFFICE OF ADMINISTRATIVE LAW

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John D. Smith
SECRETARY

In re:)	1997 OAL Determination No. 1
Request for Regulatory)	
Determination filed by the)	[Docket No. 90-034]
MICHAEL O. FINCH)	
regarding The BOARD OF)	January 8, 1997
REGISTRATION FOR)	
PROFESSIONAL ENGINEERS)	Determination Pursuant to
AND LAND SURVEYOR'S)	Government Code Section 11340.5;
policy requiring applicants)	Title 1, California Code of
taking the 1989 and 1990)	Regulations, Chapter 1, Article 3
Special Civil Engineers)	
Examinations to be tested on)	
seismic "designs" rather than)	
seismic "principles" ¹)	

Determination by: JOHN D. SMITH, Director

HERBERT F. BOLZ, Supervising Attorney
GORDON R. YOUNG, Staff Counsel
Regulatory Determinations Program

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a Board of Registration for Professional Engineers and Land Surveyor's licensing examination policy is a "regulation" and therefore without legal effect unless adopted in compliance with the Administrative procedure Act.

The Office of Administrative Law concludes that the policy is a "regulation" required to be adopted pursuant to the Administrative Procedure Act.

THE ISSUE PRESENTED²

The Office of Administrative Law has been requested to determine whether the³ Board of Registration for Professional Engineers and Land Surveyors' ("Board") policy set forth below is a "regulation" as defined in Government Code section 11342, subdivision (g), that should have been, but was not adopted in accordance with the Administrative Procedure Act ("APA");⁴

Policy requiring applicants taking the 1989 and 1990 Special Civil Engineers Examinations to be tested on seismic "designs" rather than seismic "principles".

THE DECISION^{5, 6, 7, 8}

The Office of Administrative Law finds that:

- (1) The Board's quasi-legislative enactments are generally required to be adopted pursuant to the rulemaking requirements of the APA;
- (2) The challenged policy is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g);
- (3) No exceptions to the APA requirements apply to the challenged policy found to be a "regulation."
- (4) The policy violates subdivision (a) of Government Code section 11340.5.⁹

REASONS FOR DECISION

I. THE APA AND REGULATORY DETERMINATIONS BY OAL

In *Grier v. Kizer*, the California Court of Appeal described the APA and OAL's role in its enforcement as follows:

"The APA was enacted to establish *basic minimum procedural requirements* for the adoption, amendment or repeal of *administrative regulations promulgated by the State's many administrative agencies*. (Stats. 1947, ch. 1425, secs. 1, 11, pp. 2985, 2988; former Gov. Code section 11420, see now sec. 11346.) . . . The APA requires an agency, inter alia, to give notice of the proposed adoption, amendment, or repeal of a regulation (section 11346.4), to issue a statement of the specific purpose of the proposed action (section 11346.7), and to afford interested persons the opportunity to present comments on the proposed action (section 11346.8). Unless the agency promulgates a regulation in substantial compliance with the APA, the regulation is *without legal effect*. (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744).

In 1979, the Legislature established the OAL and charged it with the orderly review of administrative regulations. In so doing, the Legislature cited an unprecedented growth in the number of administrative regulations being adopted by state agencies as well as the lack of a central office with the power and duty to review regulations to ensure they are written in a comprehensible manner, are authorized by statute and are consistent with other law. (Sections 11340, 11340.1, 11340.2)." [Footnote omitted; emphasis added.]¹⁰

In 1982, recognizing that state agencies were for various reasons bypassing OAL review (and other APA requirements), the Legislature enacted Government Code section 11340.5. That section, in broad terms, prohibits state agencies from issuing, utilizing, enforcing or attempting to enforce agency rules which should have been, but were not, adopted

pursuant to the APA. The section also provides OAL with the authority to issue a regulatory determination as to whether a challenged state agency rule is a "regulation" as defined in the APA.¹¹

If a state agency rule is a "regulation" but not properly adopted in accordance with the APA, the agency rule is invalid.

II. THE RULEMAKING AGENCY NAMED IN THIS PROCEEDING; THIS REQUEST FOR DETERMINATION

The Rulemaking Agency Named in this Proceeding: The Board of Registration for Professional Engineers and Land Surveyors

In 1929, the Legislature created the State Board of Registration for Civil Engineers.¹² Through the next several decades, the Legislature renamed the Board and expanded the scope of the original Board's powers to oversee not only civil engineers but other professional engineers as well. In 1983, the Board was given its current name.¹³ As provided in the Professional Engineers Act,¹⁴ the Board is responsible for the registration, certification, and oversight of professional engineers and land surveyors in California.

The Board of Registration for Professional Engineers and Land Surveyors ("Board") is under the jurisdiction of the Department of Consumer Affairs.¹⁵

Land surveyors are governed by the "Professional Land Surveyors' Act," which is found in Business and Professions Code sections 8700 through 8806.

The Board's regulations are set out in Title 16, California Code of Regulations ("CCR"), Chapter 5, sections 400 through 471.

Rulemaking Authority¹⁶

The Board has been granted general rulemaking authority by Business and Professions Code section 6716, which states in part:

"The board may adopt rules and regulations consistent with

law and necessary to govern its action. *These rules and regulations shall be adopted in accordance with the provisions of the Administrative Procedure Act.*" [Emphasis added.]

Business and Professions Code section 6754 grants the Board specific authority to adopt regulations governing examination for registration as an engineer. Section 6754 provides:

"Examination for registration shall be held at such times and places as the board shall determine.

The second division of the examination for all branches specified in Section 6732 shall be administered at least once each year.

Work of the board relating to examination and registration may be divided into committees as the board shall direct.

The scope of examinations and the methods of procedure may be prescribed by board rule." [Emphasis added.]

This Request for Determination

This Request for Determination was submitted to OAL by Michael O. Finch on July 13, 1990. In his Request for Determination Mr. Finch stated the following:

"In its 1989 Special Civil Examination the Board of Registration required applicants to determine nailing requirements for the designs of wooden structures and required sketches for wall anchorages (see enclosures).

Given the above legal definitions based on Court rulings clearly the Board has administered questions that test seismic 'designs' and not 'principles.' Both the California Seismic Commission and the Department of Transportation agree that the Board is testing seismic 'designs' and not 'principles' as described in the enclosed letters dated 5 March 90 and 2 May 90, respectively. Furthermore, the Board's own regulations in Title 16, California Code of Regulations (CCR), Chapter 5, Section 415 requires professional engineers only to work in the specific fields they were licensed to perform. Civil

engineering is a broad field and only a structural engineer is specifically licensed to design structures. The Board already has separate requirements for structural engineers described in 16 CCR 426.10. By testing non-structural engineers with seismic design questions is both unfair to applicants that do not have structural experience, and conflicts with the requirements of 16 CCR 415 requiring only people with proper backgrounds and experience perform specific engineering tasks. In summary, the Board of Registration has exceeded its statutory authority in administering seismic principle problems that test seismic designs and is in conflict with the regulations in 16 CCR Chapter 5." [Emphasis added.]

Mr. Finch submitted additional documentation in a letter dated August 1, 1990. Included in that documentation is a packet of material provided by the Board to applicants taking the October 1990 Special Civil Examination. Among the documents in the packet is a letter from the Board which states, in pertinent part, the following:

"The following is the recommended study guide for the Civil Engineering special two-hour examination on seismic principles and engineering surveying principles.

.

The question will be either multiple choice questions on seismic principles *or a seismic design problem.*" [Emphasis added.]

On June 18, 1993, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,¹⁷ along with a notice inviting public comment. No public comments were received during the 30-day written public comment period. The Board submitted its Response to the Request for Determination ("Response") on August 2, 1993. The Board's argument that the challenged policy does not constitute a regulation is as follows:

"The answer to the first part of the inquiry [as to whether the challenged policy is a 'regulation'] in the instant case is 'yes.'

There is no dispute that the administration and challenged portion of the Special Civil Engineers Examination are applied generally to all applicants for registration as civil engineers. However, the answer to the second part of the inquiry is 'no.' The board's administration of the test does not implement, interpret or make specific the law by testing knowledge of seismic design instead of more general seismic principles. There is sufficient statutory authorization¹⁸ for the board to use examination questions of seismic design to test an applicant's knowledge of seismic principles without the formality of regulation promulgation.

The purpose of the Special Civil Engineer Examination is to assess whether candidates for registration demonstrate the minimal acceptable level of competence required with respect to two areas of practice that are of particular concern to California civil engineers: seismic principles and engineering surveying principles. These two elements of practice are deemed of critical importance to California civil engineers' ability to provide competent professional services while protecting the public health, safety, and welfare. In relevant part, Business and Professions Code section 6755.1 provides:

' . . . the second division of the examination for registration as a civil engineer shall also include questions to test the applicant's knowledge of seismic principles and engineering surveying principles as defined in Section 6731.1. . . . ' (Emphasis added.)

It is a rule of statutory construction that unless otherwise defined, words in a statute will be interpreted as taking their ordinary, contemporary and common meaning. (*Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 496, 247 Cal.Rptr. 362.) However, in the instant case it is necessary to apply and employ the definition of engineering principles as contemplated in related statutes. It is also a fundamental rule of statutory construction that every statute should be construed with reference to the whole system of law of which it is part of so that all may be harmonized and have effect. (*Brown v. Superior Court* (1984) 37 Cal.3d 477,

484, 208 Cal.Rptr. 724.) Accordingly, the above cited section (Bus. & Prof. § 6755.1) authorizing the board to test an applicant's knowledge of seismic principles must be read in conjunction with the balance of the relevant provisions of the Professional Engineers Act (Bus. & Prof. Code § 6700 et seq.). Business and Professions Code section 6755.1 authorizes the board's examination to include test questions which specifically refer to 'seismic principles ... as defined in Section 6731.1.'

Business and Professions Code section 6731.1 provides:

'Civil engineering also includes the practice or offer to practice, either in a public or private capacity, all of the following:

(a) Locates, relocates, establishes, reestablishes, or retraces the alignment or elevation for any of the fixed works embraced within the practice of civil engineering, as described in Section 6731.

(b) Determines the configuration or contour of the earth's surface or the position of fixed objects thereon or related thereto, by means of measuring lines and angles, and applying the principles of trigonometry or photogrammetry.

(c) Creates, prepares, or modifies electronic or computerized data in the performance of the activities described in subdivisions (a) and (b).' (Emphasis added.)

Thus, the seismic engineering 'principles' referred to in Business and Profession Code section 6755.1 must relate specifically to the practices of civil engineering as defined in Business and Profession section 6731.1. This practice includes the location; establishment, alignment or elevation of fixed works as well as the determination of the configuration of fixed objects on the earth's surface' by means of measuring lines and angles.' Further definition of the

employment of engineering principles contemplated under Business and Professions code section 6731.1 refers to civil engineering practice as defined in Business and Professions Code section 6731.

In relevant part, Business and Professions Code section 6731 defines the practice of civil engineering as follows:

'Civil engineering embraces the following studies or activities in connection with fixed works for irrigation, drainage, waterpower, water supply, flood control, inland waterways, harbors, municipal improvements, railroads, highways, tunnels, airports and airways, purification of water, sewerage, refuse disposal, foundations, grading, framed and homogeneous structures, buildings, or bridges:

(a) The economics of, the use and design of, materials of construction and the determination of their physical qualities.

(b) The supervision of the construction of engineering structures.

*

*

*

(e) The preparation or submission of designs, plans and specification and engineering reports.'

Thus, the practice of civil engineering is defined to authorize a registered engineer to prepare or submit designs, plans and specifications in connection with 'fixed works' which include foundations, framed and homogeneous structures, building or bridges. Planning and designing are essential elements of a civil engineer's practice and are recognized as such under the statutory definitions. The testing of engineering principles, including the mandated testing of 'seismic principles' must include seismic design since design is an essential element of a civil engineer's practice.

Therefore, in developing and administering the Special Civil Engineers Examination, the *board has not adopted a policy which implements or makes specific section 6755.1 of the Business and Professions Code, but has instead applied the plain meaning of that statute in conjunction with section 6731.1 and 6731 of the Business and Professions Code.* Accordingly, there is no need for the board to promulgate a regulation concerning the subject matter tested in the Special Civil Engineer Examination because the only legally tenable interpretation of its statutory authority to test an applicant's knowledge of seismic principles is to employ examination questions regarding seismic designs." [Emphasis added in italics]

III. ANALYSIS

The analysis portion of this Determination is divided into three parts:

- A. Is the APA generally applicable to the Board's quasi-legislative enactments?
- B. Does the challenged policy identified in the Request for Determination constitute a "regulation" within the meaning of Government Code section 11342?
- C. Does the challenged policy found to be a "regulation" fall within any established general exception to APA requirements?

A.

- A. Is APA generally applicable to the Board's quasi-legislative enactments?

Government Code section 11000 states in part:

"As used in this title [Title 2, 'Government of the State of California'] '*state agency*' includes every state office, officer, department, division, bureau, *board*, and commission." (Emphasis added.)

This statutory definition applies to the APA: i.e., it helps OAL determine whether or not a particular "state agency" is subject to APA rulemaking requirements. Section 11000 is contained in Title 2, Division 3 ("Executive Department"), Part 1 ("State Departments and Agencies"), Chapter 1 ("State Agencies") of the Government Code. The rulemaking portion of the APA is also found in Title 2 of the Government Code; it is Chapter 3.5 of Part 1 of Division 3. The Board of Registration for Professional Engineers and Land Surveyors, a "state . . . board," is clearly a "state agency" as that term is defined in Government Code section 11000.

Furthermore, the APA narrows somewhat the broad reach of the term "state agency" given in Government Code section 11000. Government Code section 11342, subdivision (a), provides that for purposes of the APA the term "state agency" does not include agencies in the "judicial or legislative departments of the state government."¹⁹ The Board is not part of either the judicial or legislative departments of state government, but, rather, is part of the executive branch of government. Accordingly, we conclude that the Board of Registration for Professional Engineers and Land Surveyors is a state agency to which the APA rulemaking requirements generally apply.²⁰

Thus, the APA is generally applicable to the quasi-legislative enactments of the Board of Registration for Professional Engineers and Land Surveyors.

B.

Does the challenged policy identified in the Request for Determination constitute a "regulation" within the meaning of Government Code section 11342?

In part, Government Code section 11342, subdivision (g), defines "regulation" as:

" . . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . " [Emphasis added.]

Government Code section 11340.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) *No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]*" [Emphasis added.]

In *Grier v. Kizer*,²¹ the California Court of Appeal upheld OAL's two-part test as to whether a challenged agency rule is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (g), formerly subdivision (b) (See stats. 1994, ch. 1039):

First, is the challenged rule either

- . a rule or standard of general application *or*
- . a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- . implement, interpret, or make specific the law enforced or administered by the agency or
- . govern the agency's procedure?²²

If an uncodified rule fails to satisfy either of the above two parts of the test, we must conclude that it is *not* a "regulation" and *not* subject to the APA.

However, the *Grier* court also cautioned that:

". . . because the Legislature adopted the APA to give

interested persons the opportunity to provide input on proposed regulatory action (*Armistead, supra*, 22 Cal.3d at p. 204, 149 Cal.Rptr. 1, 583 P.2d 744), we are of the view that *any doubt as to the applicability of the APA's requirements should be resolved in favor of the APA.*" [Emphasis added.]²³

Three subsequent California Court of Appeal cases provide additional guidance on the proper approach to take when assessing claims that agency rules are *not* subject to the APA.

According to *Engelmann v. State Board of Education* (1991), agencies need not adopt as regulations those rules contained in "a statutory scheme which the Legislature has already established. . . ." ²⁴ But "to the extent that any of the [agency rules] depart from, or embellish upon express statutory authorization and language, the [agency] will need to promulgate regulations. . . ." ²⁵ Similarly, agency rules properly promulgated *as regulations* (i.e., California Code of Regulations provisions) cannot legally be "embellished upon" in administrative bulletins.

Union of American Physicians and Dentists v. Kizer (1990)²⁶ held that a terse 24-word definition of "intermediate physician service" in a Medi-Cal regulation could not legally be supplemented by a lengthy seven-paragraph passage in an administrative bulletin that went "far beyond" the text of the duly adopted regulation.²⁷ Statutes may legally be amended only through the legislative process; duly adopted regulations--generally speaking--may legally be amended only through the APA rulemaking process.

The third case, *State Water Resources Control Board v. Office of Administrative Law (Bay Planning Commission)* ("*SWRCB v. OAL*") (1993), made clear that reviewing authorities focus on the *content* of the challenged agency rule, not the *label* placed on the rule by the agency:

" . . . the . . . Government Code [is] careful to provide OAL authority over regulatory measures whether or not they are designated 'regulations' by the relevant agency. In other words, *if it looks like a regulation, reads like a regulation, and acts like a regulation, it will be treated as a regulation whether or not the agency in question so labeled it. . . .*" (Emphasis added.)²⁸

Application of the Statutory Test to the Board's Challenged Policies

- (1) Is the challenged policy a standard of general application or a modification or supplement to such standards?**

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order,²⁹ for instance, all Medi-Cal patients or all physicians who serve Medi-Cal patients.

Here, the challenged Engineer's Board policy is clearly a standard of general application. It applies to all applicants for registration as civil engineers taking the Special Civil Engineers Examination during the time period in question. The Board concedes³⁰ this point in its August 2, 1993 response to the Request of Determination. Thus, the policy is a rule of general application and satisfies the first prong of the two-part test.

- (2) Does the challenged policy interpret, implement, or make specific the law enforced or administered by the agency or the law which governs the agency's procedure?**

The policy clearly implements Business and Professions Code section 6755.1³¹ which, in part, expressly authorizes the Board to "... test the applicant's knowledge of seismic principles" on the second division of the Board's civil engineer licensing examination "[o]n and after April 1, 1988...."

The Board argues in its August 2, 1993 response, p.5, that the Board's policy does not implement or make specific Business and Professions Code section 6755.1 because the Board has only "... applied the plain meaning of the statute..." and "... the only legally tenable interpretation of its statutory authority to test an applicant's knowledge of seismic principles is to employ examination questions regarding seismic design."

The Board's argument is meritless on its face. It is self-evident that the plain meaning of "principles" is not identical to the plain meaning of "designs". The American Heritage Dictionary, Second College Edition (1982) p. 386 defines "design" as:

"1. To conceive in the mind; invent: designed his dream vacation. 2. To form a plan for: designed a marketing strategy for the new product. 3. To have as a goal or purpose; intend. 4. **To plan by making a preliminary sketch, outline, or drawing.** 5. **To create or execute in an artistic or highly skilled manner.** -intr. 1. To make or execute plans. 2. To create designs. -n. 1. A drawing or sketch. 2. **The invention and disposition of the forms, parts, or details of something according to a plan.** 3. A decorative or artistic work. 4. A visual composition; pattern. 5. The art of creating designs. 6. A plan; project. 7. A reasoned purpose; intention. 8. Often designs. A sinister or hostile scheme: He has designs on my job." [Emphasis added in bold.]

It defines "principle" on p. 985:

"1. A basic truth, law, or assumption: the principles of democracy. 2. a. A rule or standard, esp. of good behavior: a man of principle. B. Moral or ethical standards or judgments collectively: a decision based on principle rather than expediency. 3. A fixed or predetermined policy or mode of action: acting on the principle of every man for himself. 4. A basic, or essential, quality or element determining intrinsic nature or characteristic behavior: the principle of self-preservation natural to man. 5. **A rule or law concerning the functioning of natural phenomena or mechanical processes: the principle of jet propulsion.** 6. A basic source. 7. Principle. Christian Science. God." [Emphasis added in bold.]

Obviously, the words are not identical in meaning in the context of this determination -- one involves "a drawing or sketch" and the other "a rule or law". Given the differing meanings, it is clear that the Board implemented, interpreted, and made specific Business and Professions Code section 6755.1 by deciding to test seismic "principles" by use of questions regarding or requiring the preparation of seismic "designs". There are other ways in which seismic principles may be tested without resorting to questions limited to seismic designs. For example, the text could involve general or conceptual questions about seismic-related

formulae, rules, equations, or physical laws without requiring applicants to prepare a specific seismic structural design and still comply with the statutory mandate of testing seismic "principles". Indeed, the Board itself distinguished between testing "principles" or "designs" by referring to "either multiple choice questions on seismic principles or a seismic design problem" in its 1990 letter to applicants taking the October 1990 Special Civil Examination.

The above analysis is clearly supported by the *Grier* court at 268 Cal.Rptr. 244, 254:

"The Department further submits there was no need to promulgate a regulation because the only legally tenable interpretation of its statutory auditing authority is that statistical sampling and extrapolation procedures must be utilized. The argument is without merit. While sampling and extrapolation may be more feasible or cost-effective, it does not follow that such method is the sole *tenable* interpretation of W & IC sections 14133 and 14170. A line by line audit is an alternative tenable interpretation of the statutes."
[Emphasis in original.]

Similarly, the Board's policy decision to interpret the mandate of Business and Professions Code section 6755.1 to test seismic "principles" as permitting the testing of seismic "designs" is not the *sole tenable* interpretation of that statute.

Therefore, challenged examination policy satisfies both parts of the two-part statutory test; OAL concludes that the challenged policy is a "regulation" as defined in Government Code section 11342, subdivision (g).

C.

Does the challenged policy found to be a "regulation" fall within any established general exception to APA requirements?

Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless *expressly* exempted by statute.³² However, rules concerning certain specified activities of state agencies are

not subject to the procedural requirements of the APA.³³

None of the recognized exceptions apply to either challenged policy. In addition, the Board's response, p. 8., does not assert that any recognized exception applies because the Board argues that since the policy fails to constitute a "regulation" the issue "is moot." Even though the Board chooses not to argue any specific exception applies, it previously raised in its response in 1996 OAL Determination No. 2 and could argue in this proceeding that the policy is exempt under the "internal management" exception to the APA. We will therefore analyze whether that exception applies to this policy.

Government Code section 11342, subdivision (g), expressly exempts rules concerning the "internal management" of *individual* state agencies from APA rulemaking requirements:

"'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret or make specific the law enforced or administered by it, or to govern its procedure, *except one which relates only to the internal management of the state agency.*" (Emphasis added.)

Grier v. Kizer provides a good summary of case law on internal management. After quoting Government Code section 11342, subdivision (g), the *Grier* court states:

"*Armistead v. State Personnel Board* [citation] determined that an agency rule relating to an employee's withdrawal of his resignation did not fall within the internal management exception. The Supreme Court reasoned the rule was 'designed for use by personnel officers and their colleagues in the various state agencies throughout the state. It interprets and implements [a Board rule]. It concerns termination of employment, a matter of import to all state civil service employees. It is not a rule governing the Board's internal affairs. [Citation.] 'Respondents have confused the internal rules which may govern the department's procedure . . . and the rules necessary to properly consider the interests of all . . . under the statutes. . . .' [Fn. omitted.]' . . . [Citation; emphasis added by

Grier court.]

"*Armistead* cited *Poschman v. Dumke* [citation], which similarly rejected a contention that a regulation related only to internal management. The *Poschman* court held: 'Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community.' . . . [Citation.][³⁴]

"Relying on *Armistead*, and consistent therewith, *Stoneham v. Rushen* [citation] held a Department of Corrections' adoption of a numerical classification system to determine an inmate's proper level of security and place of confinement 'extend[ed] well beyond matters relating solely to the management of the internal affairs of the agency itself[,] and embodied 'a rule of general application significantly affecting the male prison population' in its custody. . . .

"By way of examples, the above mentioned cases disclose that the scope of the internal management exception is narrow indeed. This is underscored by *Armistead's* holding that an agency's personnel policy was a regulation because it affected employee interests. Accordingly, even internal administrative matters do not per se fall within the internal management exception" ³⁵

The challenged policy does not fall within the internal management exception. Applying the *Grier* court's explanation of this narrow exception we note that the policy applies to and was used by Board members, staff, and, *most importantly*, examination candidates and institutions preparing candidates for the examination. The policy implements the Board's statutes. It clearly concerns the qualifications required to become registered as a Civil Engineer, a matter of import to examination candidates and the general public given the responsibility and importance of work performed by registered Civil Engineers. The policy does not govern the Board's internal affairs. The policy is a rule necessary to consider the interests of all under the statute as stated in *Armistead*. Therefore, the "internal management" exception to APA rulemaking requirements does not apply to the Board's policy.


Having found the challenged policy to be a "regulation" and not exempt from the requirements of the APA, we conclude that the policy violates Government Code section 11340.5, subdivision (a).

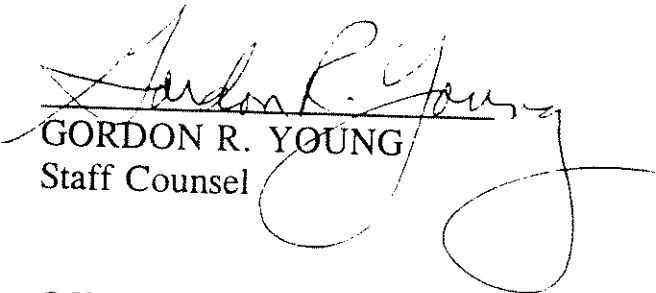
IV. CONCLUSION

For the reasons set forth above, OAL finds that:

- (1) The Board's quasi-legislative enactments are generally required to be adopted as regulations pursuant to the APA;
- (2) The challenged policy is a "regulation" as defined in Government Code section 11342, subdivision (g);³⁶
- (3) No exceptions to the APA requirements apply to the policy found to be a "regulation"; and
- (4) The policy violates Government Code section 11340.5, subdivision (a).

DATE: January 8, 1997


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1. This Request for Determination was filed by Michael O. Finch, 6400 66th Avenue, Unit 12, Sacramento, CA 95823-2737. The Board of Registration for Professional Engineers and Land Surveyors was represented by Gary W. Duke, Staff Counsel, Department of Consumer Affairs, Legal office, 400 R Street, Suite 3090, Sacramento, CA 95814.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year. Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

This determination may be cited as "1996 OAL Determination No. 3 (Professional Engineers and Land Surveyors Board)."

2. The legal background of the regulatory determination process--including a survey of governing case law--is discussed at length in note 2 to 1986 **OAL Determination No. 1** (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16, typewritten version, notes pp. 1-4. See also *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, 249-250, review denied (APA was enacted to establish basic minimum procedural requirements for the adoption, amendment or repeal of state administrative regulations).

In August 1989, a *second* survey of governing case law was published in 1989 **OAL Determination No. 13** (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

In November 1990, a *third* survey of governing case law was published in 1990 **OAL Determination No. 12** (Department of Finance, November 2, 1990, Docket No. 89-019 [printed as "89-020"]), California Regulatory Notice Register 90, No.46-Z, page 1693, note 2. The third survey included (1) five appellate court cases which were decided during 1989 and 1990, and (2) two California Attorney General opinions: one opinion issued before the enactment of Government Code section 11347.5, and the other opinion issued thereafter.

In January 1992, a *fourth* survey of governing case law was published in 1992 **OAL Determination No. 1** (Department of Corrections, January 13, 1992, Docket No. 90-010), California Regulatory Notice Register 92, No. 4-Z, page 83, note 2. This fourth survey included two cases holding that government personnel rules could not be enforced unless duly adopted.

In December 1993, a *fifth* survey of governing law was published in **1993 OAL Determination No. 4** (State Personnel Board and Department of Justice, December 14, 1993, Docket No. 90-020), California Regulatory Notice Register 94, No. 2-Z, page 61, note 3.

In December 1994, a *sixth* survey of governing law was published in **1994 OAL Determination No. 1** (Department of Education, December 22, 1994, Docket No. 90-0210, California Regulatory Notice Register 95, No.3-Z, page 94, note 3.

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), subsection 121(a), provides:

*"'Determination' means a finding by OAL as to whether a state agency rule is a 'regulation,' as defined in Government Code section 11342(g), which is **invalid and unenforceable** unless*

(1) it has been adopted as a regulation and filed with the Secretary of State pursuant to the APA, or,

(2) it has been exempted by statute from the requirements of the APA."
[Emphasis added.]

See *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied (finding that Department of Health Services' audit method was *invalid and unenforceable* because it was an underground regulation which should be adopted pursuant to the APA); and *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 (now 11340.5) in support of finding that an uncoded agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b)--now subd. (g)-- yet had not been adopted pursuant to the APA, was "*invalid*").

4. According to Government Code section 11370:

"Chapter 3.5 (commencing with Section 11340), Chapter 4 (commencing with Section 11370) and Chapter 5 (commencing with Section 11500) constitute and may be cited as, the Administrative Procedure Act." [Emphasis added.]

We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11359. Chapters 4 and 5, also part of the APA, concern the Office of Administrative Hearings and Administrative Adjudication, respectively.

The rulemaking portion of the APA and all OAL regulations are both reprinted and indexed in the annual APA/OAL regulations booklet "**California Rulemaking Law**," which is available from OAL (916-323-6225). The January 1996 revision is \$3.50 (\$6.40 if sent U.S. Mail).

5. *OAL Determinations Entitled to Great Weight In Court*

The California Court of Appeal has held that a statistical extrapolation rule utilized by the Department of Health Services in Medi-Cal audits must be adopted pursuant to the APA. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244. Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b) (now subd. (g)), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5 (now 11340.5), OAL issued a determination concluding that the audit rule met the definition of "regulation," and therefore was subject to APA requirements. **1987 OAL Determination No. 10** (Department of Health Services, Docket No. 86-016, August 6, 1987). The *Grier* court concurred with OAL's conclusion, stating that the

"Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b) [now subd. (g)]. [Citations.]" (219 Cal.App.3d at p. 434, 268 Cal.Rptr. at p. 251.)

Concerning the treatment of **1987 OAL Determination No. 10**, which was submitted to the court for consideration in the case, the court further found:

"While the issue ultimately is one of law for this court, the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is *entitled to great weight*, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.] [Citations.] [Par.] Because [Government Code] section 11347.5, [now 11340.5] subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b) [now subd. (g)], *we accord its determination due*

consideration." [Id.; emphasis added.]

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA. . . . [and therefore] deemed it to be an invalid and unenforceable 'underground. regulation.'" was "*entitled to due deference.*" [Emphasis added.]

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of **1990 OAL Determination No. 4** (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

6. *Note Concerning Comments and Responses*

In order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response."

If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

7. If an uncodified agency rule is found to violate Government Code section 11340.5, subdivision (a), the rule in question may be validated by formal adoption "as a *regulation*" (Government Code section 11340.5, subd. (b); emphasis added) or by incorporation in a statutory or constitutional provision. See also *California Coastal Commission v. Quanta Investment Corporation* (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.) Of course, an agency rule found to violate the APA could also simply be rescinded.
8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.
9. Government Code section 11340.5 provides:
- "(a) *No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined*

in subdivision (g) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule that has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (g) of Section 11342.
- "(c) The office shall do all of the following:
 - "1. File its determination upon issuance with the Secretary of State.
 - "2. Make its determination known to the agency, the Governor, and the Legislature.
 - "3. Publish its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 - "4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
 - "1. The court or administrative agency proceeding involves the party that sought the determination from the office.
 - "2. The proceeding began prior to the party's request for the office's determination.
 - "3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in

subdivision (g) of Section 11342." [Emphasis added.]

10. *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 431, 268 Cal.Rptr. 244, 249, review denied.
11. Government Code section 11340.5, subdivision (b).
12. Statutes of 1929, chapter 801, page 1646, section 2.
13. Statutes of 1983, chapter 150, section 4 (Business and Professions Code section 6710.)
14. Business and Professions Code, chapter 7, sections 6700-6799.
15. Business and Professions Code section 6710.
16. *OAL does not review alleged underground regulations for compliance with the APA's six substantive standards*

We discuss the affected agency's rulemaking authority - (see Gov. Code, sec. 11349, subd. (b)) - as a part of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. (Of course, as discussed in the text of the determination, the APA itself applies to all Executive Branch agencies, absent an express statutory *exemption*.) If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL *does not* review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether a challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions *from a specific rulemaking agency* will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

17. California Regulatory Notice Register 93, No. 25-Z, June 18, 1993, 679.
18. As set forth in 1996 OAL Determination No. 2 [Docket No. 90-033] and restated here, the Board's argument that sufficient statutory authority exists for the board to adopt and administer the policy under existing regulations begs the question at issue in this determination. The issue is not whether the Board has rulemaking authority to adopt and administer the policy pursuant to its statutes and existing regulations, but whether the policy meets the definition of "regulation" under the APA. OAL will assume for the purposes of argument that Board has authority to adopt the policy as a regulation pursuant to the APA. The Board, however, failed to adopt the policy as a regulation. The *Grier* court, *supra*, at 268 Cal.Rptr. pp .250-251, considered and rejected an almost identical argument to that made by the Board:

" The Department invokes, inter alia, W & IC section 14170, which states in relevant part: 'Amounts paid for services provided to Medi-Cal beneficiaries shall be audited by the department *in the manner and form prescribed by the department*.' (Italics added.) The Department also cites W & IC section 14133 as authorizing '(c) Postservice postpayment audit, which is review for medical necessity and program coverage after service was rendered and the claim paid. The department may take appropriate steps to recover payments made if subsequent investigation uncovers evidence that the claim should not have been paid.'

It is a fundamental rule of statutory construction that every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. (*Brown v. Superior Court* (1984) 37 Cal.3d 477, 484, 208 Cal.Rptr. 724, 691 P.2d 272.) **Accordingly, while the above-cited sections and others authorize the Department to audit providers, these sections must be read in conjunction with the balance of the Medi-Cal scheme, specifically, W & IC sections 10725 and 14124.5, which require the Department to comply with the APA in adopting regulations.**

The issue to be determined by this court is whether the challenged

audit method constitutes the subject of a regulation within the meaning of section 11342, subdivision (b), of the APA, or amounts only to an exempt internal management rule. If the method were properly the subject of a formal regulation, the Department's failure to comply with the APA would render the method invalid and unenforceable. (§ 11347.5)" [Emphasis added by bolding.]

19. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also *Auto and Trailer Parks*, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a thorough discussion of the rationale for the "APA applies to all agencies" principle, see **1989 OAL Determination No. 4** (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

1989 OAL Determination No. 4 was upheld by the California Court of Appeal in *State Water Resources Control Board v. Office of Administrative Law* (Bay Planning Coalition) (1993) 12 Cal.App.4th 697, 16 Cal.Rptr. 2d 25, rehearing denied, Feb. 19, 1993.
20. See *Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in the legislative or judicial branch must comply with rulemaking part of the APA when engaged in quasi-legislative activities); *Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
21. (1990) 219 Cal.App.3d 422, 440, 268 Cal.Rptr. 244, 251.
22. The history note to Chapter 5 ("Administrative *Adjudication*," sections 11500 - 11529; emphasis added) of Title 2, Division 3, of the Government Code, contained in West's annotated codes, reveals that Chapter 5 was originally added under the heading "Administrative *Procedure*." (Emphasis added.) Thus, the word "procedure" as used in Government Code section 11342 subdivision (g) would at a minimum appear to encompass the types of rules governing administrative *adjudication* (e.g., administrative hearings on such matters as license revocation) that are found in Chapter 5.
23. *Grier v. Kizer* (1990), 219 Cal.App.3d at p. 438, 268 Cal.Rptr. at p. 253.
24. 3 Cal.Rptr.2d 47, 63

25. Id.
26. 223 Cal.App.3d 490, 501, 272 Cal.Rptr. 886, 891.
27. Id.
28. (1993) 16 Cal. Rptr.2d 25 at 28.
29. *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552. See *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (standard of general application applies to all members of any open class).
30. Board Response, p. 3.
31. Business and Professions Code section 6755.1 states:

"The second division of the examination for registration as a professional engineer shall include questions to test the applicant's knowledge of state laws and the board's rules and regulations. On and after April 1, 1988, the second division of the examination for registration as a civil engineer shall also include questions to test the applicant's knowledge of seismic principles and engineering surveying principles as defined in Section 6731.1. No registration for a civil engineer shall be issued by the board on or after January 1, 1988, to any applicant unless he or she has successfully completed questions to test his or her knowledge of seismic principles and engineering surveying principles.

The board shall administer the questions to test the applicant's knowledge of seismic principles and engineering surveying principles as a separate part of the second division of the examination for registration as a civil engineer.

It is the intent of the Legislature that this section confirm the authority of the board to issue registrations prior to April 1, 1988, to applicants based on examinations not testing the applicant's knowledge of seismic principles and engineering surveying principles as defined in Section 6731.1."
32. Government Code section 11346.

33. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
- a. Rules relating *only* to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (g).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, *except* where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (g).)
 - c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
 - d. Rules directed to a *specifically named* person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
 - e. Legal rulings of *counsel* issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (g).)
 - f. There is weak authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. *City of San Joaquin v. State Board of Equalization* (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see *Roth v. Department of Veterans Affairs* (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); *Nadler v. California Veterans Board* (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see *Del Mar Canning Co. v. Payne* (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see *International Association of Fire Fighters v. City of San Leandro* (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see *Perdue v. Crocker National Bank* (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable). The most complete OAL analysis of the "contract defense" may be found in 1991 OAL Determination No. 6, CRNR, 91, No. 43-Z, p. 1451, 1458, 1461; typewritten version, pp. 175-177. Like *Grier v. Kizer*, 1991 OAL Determination No. 6 rejected the idea that *City of San Joaquin* (cited above in this note) was still good law.

Items a, b, and c, which are drawn from Government Code section 11342, subdivision (g), may also correctly be characterized as "exclusions" from the statutory definition of

"regulation"--rather than as APA "exceptions." Whether or not these three statutory provisions are characterized as "exclusions," "exceptions," or "exemptions," it is nonetheless *first* necessary to determine whether or not the challenged agency rule meets the two-pronged "regulation" test: *if* an agency rule is *either* not (1) a "standard of general application" or (2) "adopted . . . to implement, interpret, or make specific the law enforced or administered by [the agency]," *then* there is no need to reach the question of whether the rule has been (a) "excluded" from the definition of "regulation" or (b) "exempted" or "excepted" from APA rulemaking requirements. Also, it is hoped that *separately* addressing the basic two-pronged definition of "regulation" makes for a clearer and more logical analysis and will thus assist interested parties in determining whether or not other uncodified agency rules violate Government Code section 11340.5. In *Grier v. Kizer* (1990) 219 Cal.App.3d 422, 268 Cal.Rptr. 244, review denied, the Court followed the above two-phase analysis.

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The annual Determinations Index is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Melvin Fong), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814-4602, (916) 323-6225, CALNET 8-473-6225. The price of the latest version of the Index is available upon request. Three indexes are currently available for the following calendar years: (1) 1986-88, (2) 1989-1990, and (3) 1991-1992. Also, regulatory determinations are published in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$162.

Though the Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

34. *Armistead* disapproved *Poschman* on other grounds. (*Armistead, supra*, 22 Cal.3d at 204, fn. 2, 149 Cal.Rptr. 1, 583 P.2d 744.)
35. (1990) 219 Cal.App 3d 422 436, 268 Cal Rptr. 244, 252-253.
36. Whether the definition of "regulation" contained in Government Code section 11342, subdivision (g) *should* encompass the level of detail regarding licensing examinations which is embodied in the challenged policy of the Board is irrelevant to OAL's determination in this matter. The Legislature has seen fit to define "regulation" in this fashion and to require the Board to comply with the APA. OAL has no policy authority to change or interpret the scope of the definition of "regulation" otherwise.

Agencies with similar licensing responsibilities to those of the Board *have* adopted regulations pursuant to the APA which cover issues similar to those covered by the Board's challenged policy. For example, the Board of Dental Examiners is mandated by Business and professions Code section 1632 to test applicants for a license to practice dentistry on "... his or her skill in operative dentistry, prosthetic dentistry, diagnosis and treatment of periodontics, and his or her judgment in diagnosis-treatment planning." The Board of Dental Examiners has adopted eleven regulations to precisely define and interpret that statute's relatively vague and nonspecific mandate to test an applicant's "skill" or "judgment" in the cited subject areas. See, Title 16 CCR sections 1031 through 1037.